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No. 89-1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BETTY DONALDSON, DERYL W. DONALDSON and CHARLES M. ELLER, as Executor of the Estate of FAYE RAYE ELLER, Deceased,

Petitioners,

vs.

HOPKINS TOWNSHIP, ILLINOIS, a Municipal Corporation, and WHITESIDE COUNTY, ILLINOIS, a Municipal Corporation,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois

BRIEF OF RESPONDENT WHITESIDE COUNTY IN OPPOSITION

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The Respondent, Whiteside County, Illinois, a municipal corporation, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Illinois Appellate Court's decision in this case.

STATEMENT OF THE CASE

On April 24, 1983, petitioners Betty Donaldson and Faye Raye Eller, deceased, were involved in an automobile accident at an intersection of a Whiteside County road and a Hopkins Township road. Petitioners were passengers in an automobile travelling northbound on the Whiteside County road which was a through road. The Hopkins Township road ran generally east and west and had a visible, properly posted stop ahead sign and stop sign controlling eastbound vehicles requiring them to stop before entering the Whiteside County road. The petitioners' vehicle was struck by an eastbound automobile on the Hopkins Township road that failed to stop before entering the intersection in violation of the stop sign.

The trial court granted summary judgment in favor of Whiteside County and Hopkins Township finding that respondents owed petitioners no statutory or common law duty and that petitioners failed to establish proximate cause as a matter of law.

The Illinois Appellate Court affirmed the trial court on all grounds in an unpublished order issued under Rule 23 of the Illinois Supreme Court Rules. The Illinois Supreme Court denied petitioners' petition for leave to appeal. The petition for writ of certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The judgment of the state court rests on independent and adequate state grounds and does not warrant review by this Court.

II. No important federal question has been decided by the Illinois Appellate Court's order to warrant a grant of a writ of certiorari.

ARGUMENT

I.

THE JUDGMENT OF THE STATE COURT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioners' entire claim that they were deprived of a constitutionally protected property right rests upon an unfounded assumption that a viable cause of action was extinguished by the 1987 amendments to the Illinois Local Governmental and Governmental Employees Tort Immunity Act. Petitioners further mistakenly assume that the court below erroneously applied the amended act resulting in the defeat of an otherwise viable claim. No federal question of any kind was raised by petitioners in the state trial court and no federal law, rule or regulation is involved.

Petitioners' alleged constitutional deprivation hinges upon a review of an appellate court order affirming the

dismissal of petitioners' case by the trial court on strictly state grounds; no statutory duty, no common law duty and no proximate cause as a matter of law. Petitioners do not claim the trial court's dismissal infringed upon any constitutional right and never advanced such a claim on appeal in the Illinois Appellate Court. Petitioners' claimed constitutional property right was first raised after the appellate court rendered the order appealed from.

Since independent and adequate state grounds exist for the dismissal of petitioners' cause of action separate and apart from the constitutional question asserted by petitioners, this Court should not review the decision of the Illinois courts in this case. 28 U.S.C. § 1257(2), *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983); *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 53 L.Ed.2d 965, 97 S.Ct. 2849 (1977); *Ridgeway v. Ridgeway*, 454 U.S. 46, 70 L.Ed.2d 39, 102 S.Ct. 49 (1981).

When the trial court granted summary judgment in favor of Whiteside County and Hopkins Township, it did so not only on the basis that the court found no duty to post signs as claimed by petitioners, but also on the basis that petitioners had failed to establish a causal relationship between the alleged negligence and the injuries sustained. In the trial court, Judge Castendych in his Memorandum Opinion stated:

> The court, after carefully considering the briefs and arguments of counsel finds there was no duty on the part of Whiteside County as claimed by Plaintiffs.
>
> The court further finds there was no duty on the part of Hopkins Township to place warning devices as claimed.
>
> . . .

> While this court does not find a duty or breach thereof, if one were to assume their existence, Plaintiff would still be required to show that such breach was the proximate cause of the injury.
>
> . . .
>
> Even if we assume the Defendants created a condition by which the injuries were made possible, the injuries which were sustained were not a natural and probable result of their acts and their acts, if any, were not the proximate cause of the injuries.

It is clear from the Memorandum Opinion of the trial court that granted summary judgment, that petitioners failed to sustain a cause of action regardless of the question of duty which forms the basis of petitioners' alleged deprivation of a constitutionally protected property right. Without reference to the question of duty, and regardless of which Tort Immunity Act the appellate court relied upon, petitioners' cause of action independently failed on the issue of proximate cause. This finding of the lower court was affirmed by the appellate court when it stated:

> A *prima facie* case has not been alleged. The Plaintiff has also failed to establish a causal relationship between the alleged negligence and the injuries she sustained. (App. A, p. 9)

Even if this Court were to order the Appellate Court of Illinois to rely on the 1965 Tort Immunity Act, petitioners' cause of action would still fail.

> . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its view of federal laws, our review would amount to nothing more than an advisory opinion. (*Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).)

The Illinois Appellate Court affirmed the granting of summary judgment on the basis that the appellate court found neither a statutory duty nor a common law duty owed by either Whiteside County or Hopkins Township. It further specifically found that no *prima facie* case had been established as petitioners failed to establish a causal relationship between the alleged negligence and the injuries sustained. The appellate court affirmed the trial court on all the bases cited by the trial court, not just the duty issue. The appellate court stated:

> For all of the foregoing reasons the judgment of the Circuit Court of Whiteside County in favor of the Defendants, Hopkins Township and Whiteside County is affirmed.

Petitioners entire basis for seeking this writ of certiorari rests upon an unfounded assumption that the Illinois Appellate Court relied on the wrong statute, the 1987 Tort Immunity Act rather than the 1965 Act. The only reference to the 1987 Act is in one citation in the court's order. A review of the order demonstrates that the crux of the ruling makes no reference to the 1987 Act or its amendments. Assuming *arguendo*, that the appellate court did rely upon and apply the 1987 Act, there still remains an independent and adequate state ground to support the appellate court affirming the summary judgment; petitioners failed to establish proximate cause as a matter of law.

In making its decision the trial court ruled on all the facts presented to it and made its decision without reference to any issue of federal law or constitutional deprivation. Petitioners do not urge otherwise. This Court does not review findings of fact by a state court which do not affect the ruling on the federal question which brings the case before it. *Grayson v. Harris*, 267 U.S. 351 (1925).

The trial court decided the facts and ruled that no causal relation existed as a matter of law. This was clearly an independent and wholly adequate state ground.

Accordingly, an independent and adequate state ground for granting summary judgment and terminating petitioners' cause of action exists and this Court should not review this judgment.

II.

NO IMPORTANT FEDERAL QUESTION HAS BEEN DECIDED BY THE ILLINOIS APPELLATE COURT'S ORDER TO WARRANT A GRANT OF A WRIT OF CERTIORARI.

No question of federal law was decided by the state court when it granted respondents summary judgment. No federal rule, regulation, statute or ordinance was involved. The case did not involve an interpretation of the U.S. Constitution or treaties. The challenged Illinois order simply reviewed the evidence in an automobile personal injury case, applied state law and determined the respondents were entitled to summary judgment as a matter of state law. In doing so the state court did not rely on any federal law.

The state court simply found the respondents owed no legal duty to petitioners and further held that assuming a duty was owed, the other essential element of proximate cause was noticeably absent and independently fatal to plaintiffs' state tort claim. Illinois tort law requires a legally recognized duty, a breach thereof and damages proximately caused as a result of the breach to establish a *prima facie* case in negligence.

The order appealed from reflects nothing more than an application of fundamental state negligence law to an

auto accident. No issue of constitutional proportion or magnitude is raised by this case or the ruling of the appellate court. Petitioners assertion to the contrary is misplaced.

A fair and dispassionate review of the appellate court order demonstrates that the court's opinion did not turn upon the application of substantive changes in the Illinois Local Governmental and Governmental Employees Tort Immunity Act. It is clear that regardless of whether the 1965 or 1987 Act governed, the Act has never served under Illinois law as an extension for a basis of liability. In other words, Illinois law has consistently and correctly held that its Tort Immunity Act is not a source of creating a duty on the part of a municipality where one otherwise does not exist. (*Hannon v. Counihan*, 54 Ill.App.3d 509, 369 N.E.2d 917 (1977); *Havens v. Harris Township*, 175 Ill.App.3d 768, 530 N.E.2d 284 (1988); *Porter v. City of Urbana*, 88 Ill.App.3d 443, 410 N.E.2d 610 (1980); *Swett v. Village of Algonquin*, 169 Ill.App.3d 78, 523 N.E.2d 610 (1980).)

This principle existed long before the 1987 revisions to the Act and was in fact the basis for the Illinois Appellate Court's rejection of plaintiffs attempt to plead a duty under the Act. The heart of the appellate court order appealed from stated without any reference to the 1987 amendments as follows:

> Similarly, the Local Governmental and Governmental Employees Tort Immunity Act is an Act relative to the tort immunity of local public entities and their employees. The statute confers immunities; and its extension as a basis for liability is not warranted by the facts at bar. (App. A, p. 6)

The aforementioned legal precedent was well established in Illinois law long before the 1987 amendments. (*Hannon*

v. Counihan, 54 Ill.App.3d 509, 369 N.E.2d 917 (1977); *Porter v. City of Urbana*, 88 Ill.App.3d 443, 410 N.E.2d 610 (1980); *Swett v. Village of Algonquin*, 169 Ill.App.3d 78, 523 N.E.2d 610 (1980).)

Petitioners summarily assume that the appellate court retroactively applied the 1987 amendments to this case without reference to the order or the legal precedent applied by the Illinois Appellate Court.

The aforementioned precedent that the Local Governmental and Governmental Employees Tort Immunity Act does not serve as a basis for establishing duties which do not otherwise exist was unaffected by the 1987 amendments. The legal principle involved in no way touches or concerns a constitutional or federal right or privilege.

Petitioners' petition fails to address or refer to the reasoning of the court below. Neither the 1965 or 1987 Tort Immunity Act creates causes of action or imposes duties under Illinois law that do not otherwise exist. Therefore it is a legal impossibility for any changes in the Act to deprive plaintiffs of a cause of action.

Petitioners were not deprived of a cause of action or a property right under the Fourteenth Amendment because one never existed under Illinois law. This was the premise of the Illinois Appellate Court's holding and as such no constitutional or federal issue has been affected by the appellate court's ruling.

The appellate court issued a non-published order pursuant to Illinois Supreme Court Rule 23 affirming the trial court's judgment. Such an order is limited strictly to the parties of this particular litigation and has no precedential value. Illinois Supreme Court Rule 23 provides in part:

> A case shall be disposed of by opinion when a majority of the panel deciding the case determines that (1) the case involves an important new legal issue or modifies or questions an existing rule of law; or (2) the decision considers a conflict or apparent conflict of authority within the appellate court; (3) the decision is of substantial public interest; or (4) the opinion constitutes a significant contribution to legal literature by either an historical review of law or by describing legislative history. . . .
>
> All cases not required by the foregoing paragraph to be disposed of by opinion shall be disposed of by a written order . . . Orders are not precedential and will not be published. . . . (Illinois Supreme Court Rule 23, 110A S.H.A. 23 (1989).)

The Illinois Appellate Court's order in this case is, therefore, limited to the unique matters present in this litigation and does not qualify for review by this Court. No new rule of law or constitutional issue is decided.

The only reference to the 1987 Tort Immunity Act is in one citation in the appellate court order. Petitioners caused this petition to be brought to the appellate court's attention on a petition for reconsideration which was denied. Similarly the Illinois Supreme Court denied hearing this case. Petitioners failed to prove proximate cause as a matter of state law.

No important federal question has been decided by the state courts herein to warrant review by the United States Supreme Court.

CONCLUSION

Petitioners' cause of action was terminated by the trial court when it entered summary judgment finding that petitioners failed to establish a legal duty (statutory or common law) owed by respondents or a breach of duty proximately causing petitioners' injuries. The appellate court affirmed on independent state grounds with no important federal question meriting this Court's review. The Illinois Supreme Court found no compelling reason to review the appellate court's decision and since an independent state ground for terminating petitioners' cause of action exists, this case is not worthy of this Court's consideration.

Respectfully submitted,

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